

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-2124

To be argued by:
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
WILLIAM STUBBS,

Petitioner-Appellant,

-against-

H.J. SMITH, Superintendent,
Attica Correctional Facility,

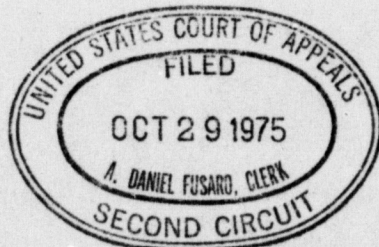
Respondent-Appellee.

Docket No. 75-2124

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P/S

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



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Docket No. 75-2124

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the statutory presumption of possession of a weapon based on mere presence in an automobile where such weapon is found, contained in New York Penal Law, Former §1899(3), and charged to the jury by the court in this case, is unconstitutional.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Curtin, D.J.) entered May 29, 1975, denying a petition for writ of habeas corpus.

This Court, by order dated October 1, 1975, assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant William Stubbs, pursuant to the Criminal Justice Act.

Statement of Facts

A. State Court Proceedings

Appellant William Stubbs was convicted, after a jury trial in Monroe County Court, New York, of the crimes of assault in the first degree and unlawful possession of a loaded firearm. He was sentenced as a second felony offender on October 7, 1966, by Monroe County Court Judge John J. Conway, Jr., to consecutive terms of imprisonment of from 13-14 years on the weapons charge, and 19-20 years on

the assault.*

Prior to appellant's trial, Shirley Miller, who had been indicted together with appellant for possession of a weapon, pleaded guilty to that offense as a misdemeanor, and received a one-year prison term (T.12**).

At appellant's trial, commencing September 6, 1966, the prosecution adduced the following evidence in support of the indictment, with appellant putting on no defense. At approximately 9:00 p.m. on March 29, 1966, Mark Wunder's attention was attracted by the sound of his dog barking in the back yard of his house in Rochester (T.89). Leaving his house and entering the back yard to investigate, Wunder noticed a man wearing an "Army type" parka with a hood crouching behind some shrubbery dividing his from his neighbor's property (T.90-91). As Wunder approached, the man started walking hurriedly away, with Wunder following behind and catching a glimpse of his face (T.92-93). Wunder identified that man as appellant (T.93). After walking a short distance, the man turned and, covering the lower part of his face with a dark cloth, told Wunder not to follow him any fur-

*Appellant successfully challenged the validity of the predicate felony conviction in this Court, Stubbs v. Mancusi, 442 F.2d 561 (2d Cir. 1971), and was re-sentenced to identical consecutive terms, a different prior felony serving as the predicate. Subsequently this Court's decision was reversed by the Supreme Court sub nom. Mancusi v. Stubbs, 408 U.S. 204 (1972).

***T" refers to pagination in the transcript of appellant's arraignment, pre-trial proceedings, trial, and sentencing.

ther (T.94-96). When Wunder continued to pursue him, the man turned and fired a gun once at Wunder (T.96-99).^{*} Subsequently, the man fired twice more at Wunder before Wunder returned to seek help from his neighbor, Lieutenant George Reiss of the Rochester Police Department (T.99-102).

After explaining to Reiss what had just occurred, Wunder and the officer began cruising the neighborhood in Reiss' unmarked police car (T.104-105, 211). Reiss noticed a 1957 Cadillac proceeding slowly down the street, its only occupant being a woman driver (T.212-213). After following it awhile, Reiss took Wunder back home and then attempted to re-locate the Cadillac (T.214-220).

Finding the car again, Reiss continued to follow it to a shopping center, where he observed a man quickly approach the car and enter it from the driver's side (T.221-223). The man was short and stocky, wearing a dark-colored parka with a hood, which matched the description previously given to Reiss by Wunder of the man Wunder had pursued (T.211, 223). Following the car, which the man was now driving, Reiss radioed to other officers for a roadblock to be set up (T. 223-224).

^{*}Robert Annechiarico, a 14-year old prosecution witness, heard what he thought was a firecracker, looked out his bedroom window, and saw Wunder chasing a man down the street. He saw the man turn with a cloth over his face, heard him tell Wunder to get back, and then saw him fire a gun at Wunder (T.175-180).

After following the car a few more blocks, Reiss saw the Cadillac pull over and stop when another police car with its flasher on pulled in behind it (T.225-227). Reiss stopped his car in front of the Cadillac and, at gunpoint, ordered the man out of the car (T.228). It was then that appellant and Shirley Miller, the woman passenger, were placed under arrest (T.234).

After searching appellant and finding no weapon on him, Reiss searched the vehicle and found a loaded .22-caliber revolver in the glove compartment (T.234-235).^{*} The officer also seized a box of .22-caliber ammunition found in the glove compartment of the car, appellant's parka, and a "black kerchief cloth" found in the pocket of the parka (T.244-248). The car was later determined to be registered to appellant (T.271).

After defense motions for a judgment of acquittal were denied and summations by the defense and prosecution completed, the court charged the jurors, reading to them the indictment charging appellant with first degree assault (N.Y.P.C. former §240(1)) and felonious possession of a weapon (N.Y.P.C. former §1897(2)), defining the elements of those crimes for them, and instructing them that the prosecution had the burden of proving each of the elements of both crimes beyond a reasonable

^{*}There was no evidence introduced to suggest that any test had been conducted to determine whether the gun found in the car had been recently fired, and no parafin test was conducted to determine whether appellant had recently fired a gun (T.270).

doubt (T.273, 307-308, 310-316, 318-320, 342-344).^{*} Pursuant to a defense request to charge that one element of the crime of possession of a weapon "is a knowing or intentional or voluntary possession on the part of the defendant" (T.348), the court instructed the jurors that

a person cannot be found guilty of possession of an unlawful item unless he knew he had it. As an example, I could get in my car and somebody could have put a gun in that glove compartment and, of course, I knew nothing about it; I would not be guilty of it. It has to be a knowing possession, you have to find the defendant had knowledge.

(T.348).

After the prosecution requested

... that the Jury be charged that the presence in an automobile other than a stolen one or a public omnibus of any firearm described in Section 1897, is presumptive evidence of its possession by all persons occupying said automobile at the time such weapon is found, except if such weapon is found upon the person of one of the occupants thereof or if such weapon is found in an automobile which is being operated for hire by a duly licensed driver or if the weapon so found is a pistol or revolver and one of the occupants has a valid license,

(T.349-350),

the court asked defense counsel if he wished to be heard on the matter and, when counsel declined (T.350), charged as follows:

^{*}The trial court's charge to the jury is found at pages 304-351 of the transcript. Because of the lightness of the type in the transcript, the charge cannot be clearly reproduced as part of the appendix; thus it will be docketed as part of a supplemental record on appeal.

I'll charge that; Section 1899 of the Penal Law says that the finding of a gun in an automobile is presumptive evidence that the gun was possessed by all persons in that car; in short, the law says, the locating of a gun in the car means that it may be presumed, if you are satisfied the gun was so found, it may be presumed by you as a Jury that the gun was in the possession, specifically in this case, passengers are not involved, the accused here is, you may presume that the gun was in the possession of the owner-occupant driver of the car.

(T.350-351). Emphasis added.

At no time was the jury informed that appellant's co-defendant, Shirley Miller, was indicted on a charge of possessing the same weapon appellant was indicted for possessing, nor was the jury ever apprised of the fact that Shirley Miller had pleaded guilty to possession of that weapon. On September 14, 1966, the jury returned with its verdict of guilty on both counts of the indictment.

Prior to imposition of sentence on October 7, 1966, appellant spoke on his own behalf and objected to the fact he had been convicted of a weapon when "no evidence shows it belonged to him, or he knew of its existence, when another person has pleaded guilty to the ownership and possession of the same .22 caliber revolver," a fact the jury never knew (T.13-14). The court denied the "motion" (T.15).

Appellant's conviction was affirmed without opinion by the Appellate Division, 30 A.D.2d 777 (4th Dept. 1968), but, on a motion for re-argument in the Appellate Division filed

by volunteer counsel, the court wrote:

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent, v. WILLIAM STUBBS, Appellant.
-- Motion for reargument of appeal denied.
Memorandum: The volunteer counsel for appellant proceeds in his moving papers upon the false assumption that this court limits its examination of a record on appeal from a judgment of conviction of an indigent defendant to the points presented in the brief of an assigned counsel. Concededly the brief filed herein by such counsel was woefully inadequate. It does not follow, however, that before affirming the judgment we did not examine with care the entire record including the severity of the punishment. For the enlightenment of volunteer counsel this court before affirming the judgment reviewed the probation report that was before the sentencing court. Present
-- Bastow, P.J., Goldman, Marsh and Henry, J.J.

30 A.D.2d 932 (4th Dept.
1968). Emphasis added.

The New York Court of Appeals denied leave to appeal on September 23, 1968, and the Supreme Court denied certiorari, 393 U.S. 1108 (1969).

B. Federal Court Proceedings

Appellant, confined at Attica Correctional Facility, filed the instant pro se habeas corpus petition in the United States District Court for the Western District of New York on August 14, 1972.* Among other things, appellant claimed that

*Appellant's pro se petition and pro se supplemental petition are Documents #1 and #3 to the record on appeal.

there was

no evidence submitted that the petitioner knew anything about this firearm in his car, [and] the trial judge still failed to inform the jury that the petitioner had a co-defendant, and went on to charge the jury on the illegal possession count as if the petitioner was in the car by himself.

The District Judge, The Honorable John T. Curtin, appointed counsel to represent appellant on December 17, 1973. In his brief, counsel raised two issues: (1) Whether the use of the presumption of possession as found in former New York Penal Law, Section 1899(3), where a co-defendant has already pleaded guilty to possession of the same weapon, is a violation of petitioner's constitutional right to due process of law; and (2) Whether the prosecution's suppression of evidence and concealment of vital information from the jury constitutes a violation of petitioner's constitutional right to due process of law.

On May 29, 1975, the District Court denied the writ on the merits.* Although no issue of exhaustion was raised by the State, Judge Curtin found that "it is difficult to ascertain whether the state court considered these questions" in light of the summary affirmances of the conviction, but nonetheless found that "requiring exhaustion would be futile because the contentions made are without merit."

*The decision and order of the District Court denying the writ is "B" to appellant's separate appendix.

On the merits, the District Court found, among other things, that

there was sufficient evidence before the jury for them to conclude beyond a reasonable doubt that the weapon was found in the glove compartment. This, coupled with the evidence of the petitioner's involvement in a shooting minutes before, was sufficient for a finding of power to exercise dominion and control over the weapon by the petitioner.

Decision and Order, Appendix "B" at 4.

By order dated September 19, 1975, this Court granted a certificate of probable cause.

STATUTES INVOLVED

NEW YORK PENAL LAW

[Former] §1897. Possession of weapons and dangerous instruments and appliances

2. Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a felony. Such possession shall not, except as provided in subdivision three of this section, constitute a felony if such possession takes place in such person's home or place of business.

[Former] §1899. Presumptions of possession, unlawful intent and defacement

3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot [sic] is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

ARGUMENT

THE STATUTORY PRESUMPTION OF POSSESSION OF A WEAPON BASED ON MERE PRESENCE IN AN AUTOMOBILE WHERE SUCH WEAPON IS FOUND, CONTAINED IN NEW YORK PENAL LAW, FORMER §1899(3), AND CHARGED TO THE JURY BY THE COURT, IS UNCONSTITUTIONAL.

Appellant's conviction in County Court for possession of a firearm* rested upon a statutory presumption** which is irrational and arbitrary, and therefore unconstitutional.***

*Although appellant was also convicted of first degree assault, he recieved consecutive sentences on both counts, and therefore a live case or controversy exists concerning the length of his confinement. Benton v. Maryland, 395 U.S. 784, 788 (1969).

**Now New York Penal Law §§265.15(3), L.1965, c.1030, effective September 1, 1967, as amended L.1970, c.1012, §2, as further amended L.1974, c.179, §4.

***While the precise formulation of the issue on this appeal was not presented in the District Court, that should not prevent this Court from reviewing it. United States ex rel. Irons v. Montanye, Doc. No. 74-2676, slip op. 4657 (2d Cir., July 7, 1975). Its present form is simply a refinement of the issue raised below that "the use of the presumption of possession as found in former New York Penal Law section 1899 where a co-defendant has already pleaded guilty to possession of the same weapon is a violation of ... due process." In both cases, the issue is the unconstitutionality of the statutory presumption, even though assigned counsel below placed more emphasis on the fact that the co-defendant pleaded guilty to the offense than has been felt necessary to do on this appeal.

Moreover, either formulation comports with the substance of appellant's claim in his pro se petition that there was "no evidence submitted that the petitioner knew anything about this firearm in his car ... and [the court] went on to charge the jury on the illegal possession count as if

The irrationality of the presumption is highlighted in the context of this case where the gun was found in the glove compartment of a car originally occupied and operated by another person who, while admitting appellant into the vehicle and permitting him to drive it shortly before their arrest, pleaded guilty prior to appellant's trial to possession of the weapon.

The statute in effect at the time of the crime alleged here, defining the substantive crime of unlawful possession of a firearm, N.Y.P.L. Former §1892(2),* required that one must knowingly have possession or be able to exercise dominion and control over the weapon.** People v. Russo, 273 A.D. 98 (1st Dept.), aff'd., 303 N.Y. 673 (1951); People v. Anthony, 21 A.D.2d 666 (1st Dept. 1964), cert. denied, 379 U.S. 983 (1965); cf., People v. Persce, 204 N.Y. 397, 402 (1912). The statute requires that the prosecution prove this element of knowing actual or constructive possession

(Footnote continued from the preceding page)

the petitioner was in the car by himself." While the District Court found that it was "difficult to ascertain whether the state court considered these questions" in light of the summary affirmances of the conviction, on appellant's direct appeal the Appellate Division made it clear that it had "examined with care the entire record," and the State did not raise any question as to exhaustion.

*Now New York Penal Law §§265.01, 265.02, L.1974, c. 1041, §3, effective September 1, 1974.

**Now codified in New York Penal Law §§10.00(8), 15.10, 15.15(2), L.1965, c.1030, effective September 1, 1967.

by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). However, by resort to the presumption in N.Y.P.L. Former §1899(3), which provides that "presence in an automobile ... of any firearm ... is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon ... is found ...," the prosecution has been excused from its traditional burden. Although the New York Court of Appeals has previously upheld the constitutionality of this presumption (People v. Russo, *supra*; see also People v. Gerschinsky, 281 N.Y. 581 (1939)), it cannot pass constitutional muster in light of recent decisions in the law of presumptions.

At the very least, now

a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Leary v. United States,
395 U.S. 6, 36 (1969).

However, the applicable standard by which the constitutionality of criminal presumptions is tested may be, and we contend should be, stronger still. The Leary Court expressly left open the question of whether a criminal presumption which met the foregoing "more likely than not" standard "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends

upon its use." Id., 395 U.S. at 36, n.64. While the Supreme Court has continued to leave that precise question open in two subsequent cases (Turner v. United States, 396 U.S. 398, 416 (1970); Barnes v. United States, 412 U.S. 837, 843 (1973); see also Overstock Book Company v. Barry, 436 F.2d 1289, 1294 (2d Cir. 1970); United States v. Matalon, 425 F.2d 70 (2d Cir. 1970)), it has given recent indication that it may be coming closer to answering the question in the affirmative. Mullaney v. Wilbur, ___ U.S. ___, 44 L.Ed.2d 508 (1975); see also McCormick, EVIDENCE, §344, at 816 (2d ed. 1972), predicting that the reasonable doubt standard of In re Winship, supra, will be applied to test the validity of criminal presumptions.

In view of the prosecution's constitutional burden of proving all the elements of a crime beyond a reasonable doubt, it would be anomalous to substitute a statutory presumption permitting the prosecution to prove a fact which does not establish the presumed fact constituting an element of the crime beyond a reasonable doubt. Therefore, appellant contends that the proper standard for determining the constitutionality of the statutory presumption in this case is the "reasonable doubt" standard adverted to in Leary.

Even if this Court were not to adopt the reasonable doubt standard, however, the "more likely than not" standard would still require a finding that the presumption charged

to the jury here fails to accord with due process.*

Common experience does not assure us that every occupant of a vehicle is likely to have constructive possession of items within an automobile, particularly where that item is discovered in the glove compartment and the occupant, like appellant, has only just taken over the wheel from another person who previously had sole possession while operating the vehicle. In fact, prior to the enactment of the presumption here in issue, New York courts held that bare presence in an automobile was insufficient evidence upon which to sustain a conviction for possession of a weapon found therein. People v. DiLandri, 250 App.Div.52 (1st Dept. 1937). Moreover, a consistent line of cases in New York courts demonstrates that where no presumption is available to circumvent the prosecutor's burden of proof, mere evidence of proximity to contraband is insufficient to stamp the defendant as sole or joint possessor with knowledge of the substance or item possessed.** See United States v. Kearse, 447 F.2d 62 (2d Cir. 1971).

*In United States ex rel. Rogalski v. Jackson, 146 F.2d 251, 253 (2d Cir. 1944), this Court in dicta applied the "rational connection" test of Tot v. United States, 319 U.S. 463, 467 (1943), in considering the validity of the statutory presumption here in issue. As has already been shown, the Tot test requiring merely a "rational connection" between the proven fact and the fact to be inferred from it is no longer the applicable standard.

**A defendant's presence in an apartment is insufficient evidence to infer actual or constructive possession of contraband found therein. People v. Siplin, 29 N.Y.2d 841 (1971);

In United States v. Romano, 382 U.S. 136 (1965), involving a Federal statute which made bare presence at an unregistered still presumptive evidence of "possession, custody and ... control" of the still, the Supreme Court concluded that the inference sought to be drawn was arbitrary, hence a denial of due process, since a person present at a still might as well be "in one of the supply, delivery, or operational activities" as "in one of the specialized functions connected with possession." Id., 382 U.S. at 141; see also Bozza v. United States, 330 U.S. 160 (); compare United States v. Gainey, 380 U.S. 63 (1965), involving a statute related to the one in Romano making mere presence at a still presumptive proof of the crime of carrying on an

(Footnote continued from the preceding page)

People v. Lunsford, 46 A.D.2d 612 (1st Dept. 1974); People v. Jefferson, 43 A.D.2d 112 (1st Dept. 1973); see People v. Perry, 2 N.Y.2d 785 (1956). Bare evidence of a defendant's proximity to drugs in a common passageway of a multiple dwelling will not sustain a conviction for possession on the hypothesis that he was either the sole possessor or was acting in concert with other defendants nearby. People v. Torres, 45 A.D.2d 1042 (2d Dept. 1974); People v. Gogarty, 5 A.D.2d 413 (1st Dept. 1958). Similarly, proximity to drugs in a restaurant, even by a defendant who was employed there when the drugs were found in a paper bag in open view in the kitchen, constitutes insufficient evidence of possession. People v. Santiago, 45 A.D.2d 1041 (2d Dept. 1974); see also People v. Freeman, 41 A.D.2d 811 (1st Dept. 1973) (defendant found in personal possession of drugs in bar could not also be convicted of possession of other drugs found concealed nearby). And, of course, a defendant's mere presence with a companion who possesses contraband cannot sustain a conviction. People v. Comacho, 47 A.D.2d 527 (2d Dept. 1975); see generally People v. Patello, 41 A.D.2d 954 (2d Dept. 1973); see also United States v. DiRe, 332 U.S. 581 (1948).

unregistered distillery. Recognizing the extreme secrecy with which illegal stills are conducted, the Court in Gainey found it rational to presume that one who was present at the still's "arcane spot" was an aider and abetter in carrying on the still's business. Id., 380 U.S. at 67-68.

Since the presence of the defendant in Romano at an illegal still could not rationally give rise to a presumption that he was in possession or control of the still's operation, it is even less rational to presume that an occupant of a car knowingly possesses a gun secreted in the vehicle, particularly since, unlike a still, there is nothing inherently illegal about a car or presence in one. In short, just as "[t]he word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears" (Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971)), similarly presence in an automobile can provide no magical justification for a state to evade the important constitutional requirement that all the elements of a crime must be proved beyond a reasonable doubt by use of a presumption which does not necessarily lead to the requisite finding of possession.

In the instant case, there was no particular likelihood that appellant need to have knowingly possessed the gun discovered in the glove compartment. While the car was registered to appellant, it was Shirley Miller who was seen driving it previously alone, and appellant was seen to enter and

drive the vehicle only for the short period of time before the car was stopped. It is entirely possible that the gun was placed in the glove compartment by Shirley Miller, without appellant's knowledge, particularly in view of the fact that she pleaded guilty to the gun's possession prior to appellant's trial. Moreover, there was no connection shown between the gun appellant was said to have fired at Mark Wunder and the .22-caliber revolver found in the car. Since the prosecution apparently failed to determine whether the weapon found in the car had been recently fired, despite ample opportunity to do so, it is eminently reasonable to assume that there were actually two guns involved in this case and that appellant had no knowledge of the second one.

In any event, contrary to the finding of the District Court, the fact that there may have been sufficient evidence to convict appellant of possession of the gun found in the car, without the aid of the statutory presumption, is irrelevant. The court charged the jury based on the presumption that

the finding of a gun in an automobile is presumptive evidence that the gun was possessed by all persons in that car; in short, the law says, the locating of a gun in the car means that it may be presumed, if you are satisfied the gun was so found, ... that the gun was in the possession of, specifically in this case, passengers are not involved, the accused here is, you may presume that the gun was in the possession

of the owner-occupant driver of the car.[*]

As the Supreme Court said in Romano, in a similar situation:

This latter instruction may have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other evidence of possession and convicted the defendants on evidence of presence alone.

United States v. Romano,
supra, 382 U.S. at 138-139.

So, too, in the present case, the jury could have disregarded the evidence of appellant's assault with a gun on Mark Wunder and convicted him of possessing the gun in the car based on the statutory presumption. See also Leary v. United States,

*Significantly, the court's charge varied from the statute by instructing the jurors that "passengers are not involved, the accused here is, you may presume that the gun was in the possession of the owner-occupant of the car." As a result, the jury was in effect told to exclude the possibility that Shirley Miller had placed the gun in the glove compartment unbeknownst to appellant, thereby destroying the benefit of the court's prior instruction that appellant's possession must be knowing, and depriving appellant of perhaps his only chance of acquittal on the gun possession charge. Moreover, the fact that defense counsel failed to object to the instruction at the time cannot serve to prevent review of the constitutionality of the statutory presumption which served as a basis for the court's charge (United States ex rel. Schaedel v. Follette, 447 F.2d 1297, 1300 (2d Cir. 1971); cf. United States ex rel. Irons v. Montanye, supra, slip op. at 4661-4662), particularly since appellant's own objections prior to the imposition of sentence ("no evidence shows [the gun] belonged to him, or he knew of its existence, when another person has pleaded guilty to the ownership and possession of the same .22 caliber revolver"), however inartful, was sufficient to raise the issue of the irrationality of the statutory presumption, and the Appellate Division stated that it "examine[d] with care the entire record."

supra, 395 U.S. at 31; United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972).

Nor can it be maintained that appellant could have readily rebutted the presumption by going forward with an explanation as to his lack of knowledge of the gun's presence in the car. Indeed, the statute does not expressly provide for rebutting the presumption (compare the statute in United States v. Gainey, supra, 380 U.S. at 64, providing that presence at an illegal still is sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury"), and the jury was never told that it could be rebutted.* In any event, the Supreme Court has expressly rejected the argument that the prosecutor, via a presumption, should be allowed to circumvent either his burden of going forward or his burden of proof simply because the defendant might be in a better position to explain. Turner v. United States, supra, 396 U.S. at 407-408, n.8; Leary v. United States, supra, 395 U.S. at 44-45; Tot v. United States, supra, 319 U.S. at 469-470.

The due process clause of the Fourteenth Amendment, reflecting a fundamental value determination of our criminal

*Indeed, the jurors were never actually told that they could even reject the presumption of possession. While the court seemingly used the permissive term "may" in its charge on the presumption, there is no assurance that the jurors understood from this word, which is often misused and confused with the peremptory word "must," that they were free to reject the presumption of appellant's possession of the gun from his mere presence in the car.

law which is rooted in the concept of ordered liberty, "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, supra, 397 U.S. at 364. Since appellant's conviction may well have been secured in disregard of this essential element of due process in favor of an irrational and unconstitutional presumption, the judgment of conviction for possession of a weapon should be reversed.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed, the State court conviction vacated, and a new trial on the possession of a weapon charge held.

Respectfully submitted,

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October 29, 1975

CERTIFICATE OF SERVICE

October 29, 1975

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of New York.

Richard A. Greenberg